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No. 225.

Brf. of Attorney General (Pradt)
for Appellant.
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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
WILLIAM T. EWING. } No. 225.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

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STATEMENT OF THE CASE.

The claimant was postmaster at Gadsden, Ala., during the period from July 1, 1866, to July 1, 1874.

As such postmaster he was paid:

For his services between July 1, 1866, and July 1, 1868, at $73 per year, or for two years	$146.00
For his services between July 1, 1868, and July 1, 1870, at $220 per year, or for two years	440.00
For his services between July 1, 1870, and July 1, 1872, at $460 per year, or for two years	920.00
For his services between July 1, 1872, and July 1, 1874, at $540 per year, or for two years	1,080.00
Aggregating	2,586.00

During his first biennial term his adjusted salary was less than $100 per annum.

During his second, third, and fourth biennial terms his adjusted salary was more than $100 and less than $1,000 per annum. (Rec., p. 6.)

During the same period the aggregate amount of commissions upon the receipts of his office, as provided by chapter 61 of the laws of 1854, would have been:

For the first biennial term (July 1, 1866, to July 1, 1868)	$531.90
For the second biennial term (July 1, 1868, to July 1, 1870)	1,015.00
For the third biennial term (July 1, 1870, to July 1, 1872)	1,179.67
For the fourth biennial term (July 1, 1872, to July 1, 1874)	1,311.16
Aggregating	4,037.73

(R., p. 16.)

The claimant made application in writing to the Postmaster-General for a readjustment and payment of his salary during said period, under chapter 119 of the laws of 1883, upon which application the Postmaster-General, pursuant to said statute, examined into and adjusted the salary of the claimant for the period of his service, and determined that for the biennial term July 1, 1868, to July 1, 1870, there was due the claimant on such readjustment $91.90; that for the biennial term July 1, 1870, to July 1, 1872, there was due the claimant on such readjustment $95; that for the biennial term July 1, 1872, to July 1, 1874, there was nothing due the claimant, the increase in the commissions over the salary allowed being less than 10 per cent of the salary. For the biennial term July 1, 1866, to July 1, 1868, the

Postmaster-General found that the returns for the third and fourth quarters of 1864; first, second, and third quarters of 1865, and first quarter of 1868 were not of record, and that no review could be made for that term. (R., pp. 14, 15, and p. 8.)

The total amount of $186.90 found due the claimant by the Postmaster-General upon this adjustment of his salary was paid to the claimant, making the aggregate amount paid to the claimant as compensation for his services during the total period of his service, $2,772.90. (R., p. 6.)

The claimant brought suit in the Court of Claims for $1,265.83, being the difference between $2,772.90, the compensation paid him as such postmaster, and $4,037.73, the amount of commissions upon the receipts of his office under the act of 1854, during his period of service, claiming that this amount was due him upon a proper readjustment of his salary pursuant to the statute of 1883.

The Court of Claims rendered judgment for the claimant in the full amount claimed by him. (R., p. 17.)

ASSIGNMENT OF ERRORS.

The court erred:

First. In finding that there was due to the claimant upon the readjustment of his salary by the Postmaster-General the sum of $1,264.83, or any other amount in excess of the amount of $186.90, found due by the Postmaster-General to the claimant upon such readjustment.

Second. The court erred in not holding that the readjustment of the claimant's salary as postmaster made by Postmaster-General Wanamaker, as set forth in the findings of fact, was a proper and valid readjustment of such salary as prescribed and intended by the statutes of the United States relating to readjustment of salaries of postmasters.

Third. The court erred in not dismissing the claimant's petition.

ARGUMENT.

PERTINENT STATUTES AND JUDICIAL INTERPRETATION OF THE SAME.

A review of various statutes relating to the compensation of postmasters, and more especially to the adjustment and readjustment of their salaries, and of the decisions of this court construing and applying the same, is necessary to a correct understanding of the claim made in this case, and, indeed, to an intelligible statement of the question involved.

By the statute of June 22, 1854 (10 Stat., c. 61, p. 298), the Postmaster-General was authorized to allow the postmasters commissions at various rates upon the postage collected at their respective offices. This system was changed by the act of July 1, 1864 (13 Stat., c. 197, p. 335), which divided the postmasters into five classes and substituted fixed salaries in place of commissions upon the receipts of their offices. These salaries the Postmaster-General was empowered and directed to estimate or adjust by assigning to each class, respectively, in even dollars, tens of dollars, or

hundreds of dollars, according to the amount of the prior compensation of the office, a salary in amount as nearly as practicable the same as, but not exceeding, the average compensation in commissions of the postmasters of each class for the two years next preceding the 1st day of July, 1864. For this purpose it was made the duty of the Auditor of the Treasury for the Post-Office Department to obtain from postmasters their quarterly accounts with the vouchers necessary to a correct adjustment thereof, and to report to the Postmaster-General all failures of postmasters to render such returns within a proper period after the close of each quarter.

These salaries were to be thus adjusted to take effect in the fourth and fifth classes [to which classes claimant belonged] on the 1st day of July, 1864, or at the commencement of a quarter as nearly as practicable thereafter. Section 2 of this act constituted the following important provision:

> That the Postmaster-General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust on the basis of the preceding section, the salary assigned by him to any office; but any change made in such salary shall not take effect until the first day of the quarter next following such order, and all orders made assigning or changing salaries shall be made in writing and recorded in his journal, and notified to the Auditor for the Post-Office Department.

This section was amended by the act of June 12, 1866 (14 Stat., c. 114, p. 60, sec. 8), by adding to the same the following proviso:

> *Provided*, That when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of eighteen hundred and fifty-four, fixing compensation, then the Postmaster-General shall review and readjust under the provisions of said section.

These statutory provisions relating to the salaries of postmasters were construed by this court in the case of the *United States* against *McLean* (95 U. S., p. 750).

This was an action, commenced in the Court of Claims, in which the claimant alleged that he was appointed postmaster at Florence, Kans., on the 13th of March, 1871, and his salary fixed at $7 until it could be ascertained what the business of his office would be; that he entered upon the duties of his office on the 14th of April, 1871, continuing therein until after July 1, 1872, from which date his salary was fixed at $560 a year. His claim was that under the statutes above referred to he was entitled to be paid for his service between April 14, 1871, and July 1, 1872, the sum of $578, upon the basis of the provisions of said statutes relating to the compensation and the adjustment and readjustment of the salaries of postmasters. It further appeared in the case that during the period for which this claim was asserted the claimant made no application for readjustment of his salary as first fixed other

than a letter of complaint of the inadequacy of his compensation to the Third Assistant Postmaster-General, which letter, however, was unaccompanied by any sworn statement of the income of his office and furnished no basis for readjustment. Subsequently, in October, 1872, after his salary had been fixed at $560 on July 1 of that year, a person claiming to be the claimant's attorney wrote to the Department requesting that the order readjusting the salary should be modified so as to take effect from April 14, 1871; but this application was also unaccompanied by any sworn statement of the revenue of the office.

On appeal to this court from a judgment in favor of the claimant it was held upon the foregoing statement of facts that the claimant's action could not be maintained, because there had been no readjustment of the salary of the claimant during the period for which he claimed, and that such readjustment was a condition precedent to the claimant's right of recovery. And the statutes above quoted received the following construction:

> From a review of these statutory provisions it appears plainly that, after a salary of a postmaster has been fixed, a readjustment by the Postmaster-General must be made before it can be increased, and the readjustment takes effect in all cases prospectively.
>
> *United States* v. *McLean*, 95 U. S., p. 763.

There was also added the intimation that if the Postmaster-General had failed to do his duty in not

making such readjustment he might have been constrained by a *mandamus*.

Thereafter Congress enacted the statute of March 3, 1883 (22 Stat., c. 119, 487), as follows:

> That the Postmaster-General be, and he is hereby, authorized and directed to readjust the salaries of all postmasters and late postmasters of the third, fourth, and fifth classes, under the classification provided for in the act of July first, eighteen hundred and sixty-four, whose salaries have not heretofore been readjusted under the terms of section eight of the act of June twelfth, eighteen hundred and sixty-six, who made sworn returns of receipts and business for readjustment of salary to the Postmaster-General, the First Assistant Postmaster-General, or the Third Assistant Postmaster-General, or who made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions under the act of eighteen hundred and fifty-four; such readjustments to be made in accordance with the mode presented in section eight of the act of June twelfth, eighteen hundred and sixty-six, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made: *Provided*, That every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to said readjustment; and that each payment made shall be by warrant or check on the Treasurer

> or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the post-office within whose delivery he resides, and which address shall be set forth in the application above provided for.

Following the enactment of this statute McLean presented a petition to the supreme court of the District of Columbia for a writ of *mandamus* against the Postmaster-General to compel him to make the readjustment which this court had held in *United States* v. *McLean* (*supra*) to be a prerequisite to any liability of the Government to the claimant. The petition was dismissed and the case was thereupon taken to this court upon a writ of error.

This court, after a careful review of all the statutes above referred to, including the statute of 1883, held that no readjustment of the salaries of postmasters was contemplated in these statutes oftener than once in two years, as a legal duty or obligation on the part of the Postmaster-General, and that hence the contention of the petitioner, that it was the duty of the Postmaster-General to readjust his salary as often as the return of any quarter showed that the salary received was 10 per cent less than the commissions for that quarter would have been, was without foundation. Accordingly, the judgment of the court below was affirmed, the court holding as follows:

> As the record shows that there were not returns from the post-office of the plaintiff for two years preceding the time when he demanded

> that a readjustment should take place, and also that a readjustment was made for the period from July 1, 1872, to July 1, 1874, it is obvious, according to this construction of the statutes, that there is no duty on the Postmaster-General to make the readjustment asked for.
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> *McLean* v. *Vilas*, 124 U. S., 97.

It is clear from the foregoing decisions that the readjustment provided for in the various statutes relating to that subject is a biennial readjustment, to be made upon the basis of eight quarterly returns, and that so far as the statute of 1864 and the proviso of 1866 are concerned, this readjustment was to be made, not of salaries already earned, but of prospective salaries, and to be based upon the eight quarterly returns immediately preceding the commencement of the biennial term for which the salary was adjusted. As directed by the proviso of 1866, such adjustment was to be made whenever, at the close of a regular biennial term of a postmaster, it appeared that the salary which he had received during that period was 10 per cent less than the amount of commissions upon the receipts of his office during such term would have been. When thus readjusted to an amount as nearly as practicable the same as, but not exceeding, such average compensation in commissions for the term just ended, the salary would be fixed or readjusted for the coming term.

PURPOSE AND EFFECT OF STATUTE OF 1883.

So far there is no controversy in this case; but the question now arises as to the extent to which the statute of 1883 changes the situation. One change is, of course,

apparent. The statute of 1883, having been passed several years subsequent to the repeal (in 1874) of the statute of 1864, providing for the compensation of postmasters by salaries instead of by commissions, of necessity relates to the readjustment of past salaries, whereas, as has been shown, the prior statutes relating to the readjustment of salaries of postmasters applied only to prospective salaries. This fact has been twice referred to, in passing, by this court as follows:

> * * * under the act of Congress of March 3, 1883, which authorized and directed the Postmaster-General in proper cases to make readjustments of salaries which should act retrospectively, * * * .
>
> *McLean* v. *Vilas*, *supra*, p. 87.
>
> It was not until 1883 that the Postmaster-General was authorized to readjust the compensation of postmasters and to make such readjustments retrospective.
>
> *United States* v. *Verdier*, 164 U. S., p. 216.

On this point the claimant and the defense also agree. But the claimant further contends—and here arises the sole question in this case—that by the statute of 1883 a new method of readjustment was provided; that by that statute it is contemplated that the Postmaster-General, on proper application made to him by any postmaster or late postmaster for readjustment of his salary for any biennial term included in the period from 1864 to 1874, should compare such salary with the amount which he would have received in commissions on the receipts of his office under the statute of

1854 during said term, and if on such comparison it should appear that the salary thus allowed was ten per centum or more less than such commissions, then to readjust the salary by stating and allowing such difference. The radical difference between the method of readjustment thus contended for and that prescribed by the statutes of 1864 and 1866, as interpreted by this court, is obvious. By the latter method the basis of comparison and readjustment of any salary is the eight quarterly returns of the postmaster immediately preceding the term for which the salary is adjusted. According to the claimant's contention this comparison should now be made between the salary to be readjusted and the eight quarterly returns of the term of the salary itself. What warrant is there for this contention? Counsel for claimant, in his brief which he has courteously furnished the defense in advance of the writing of this brief, seems to rest it on the intention of Congress to remedy the wrong which he alleges had been done to the postmasters in the operation of the prior statutes, and the alleged absurdity and injustice of applying to the readjustment directed by the statute of 1883 the rule of readjustments laid down in the statutes of 1864 and 1866, also upon the references of this court to the retrospective effect of the statute of 1883, quoted above. It would seem, however, that the primary foundation for this claim should be the statute itself; accordingly, the statute will be first considered.

Referring, then, to the statute of 1883, the rule of adjustment provided for therein seems to be unmistakably stated in the following language:

> * * * such readjustments to be made in accordance with the mode presented in section 8 of the act of June 12, 1866, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made. * * *

"The mode presented in section 8 of the act of June 12, 1866," has already been shown to consist in using as a basis of the readjustment the eight quarterly returns immediately preceding the term of the salary to be readjusted, and this mode the statute of 1883 directs to be adopted in the readjustments authorized thereby. This is made the more emphatic by the further requirement that such readjustments are "to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business or quarterly returns were made."

It is difficult to perceive how the salary for any term of a postmaster could be readjusted according to the method contended for by the claimant by using the eight quarterly returns of the term itself, during which said salary was paid, as a basis for the readjustment and yet have such readjustment date from the beginning of the quarter *succeeding* that in which such sworn returns or quarterly returns were made. That would seem to be a readjustment that does not readjust.

INTENT OF THE STATUTE.

Counsel for claimant is emphatic in asserting that a grievous wrong had been done the postmasters by the

changing of their compensation from commissions to salaries, by reason of the general greatly increased business of the various post-offices, whereby the compensation by commissions upon the receipts would in most instances have been largely in excess of the salary allowed; and this wrong, it is contended, the prior statutes relating to the readjustment of salaries of postmasters failed to right, so that the statute of 1883 was manifestly passed for that express purpose, and to hold otherwise would be to make the statute not only a vain thing but an absurdity.

It may be that in a sense there is some foundation for this assertion, but it is very certain that Congress had a right to change the method of compensation of postmasters from commissions to salaries, and that thereby no wrong whatever was done to anyone.

The salaries thus paid were the legal compensation for the services of the postmasters, and any increase thereof through statutes of readjustment is in the nature of a gratuity. As stated in the Verdier case with relation to the claim of Verdier as postmaster for a readjustmented salary, "he had performed services for which an indebtedness was subsequently voluntarily created by the Government."

United States v. *Verdier*, *supra*, p. 219.

At all events, Congress, by its statutes of 1864 and 1866 relating to readjustment of salaries of postmasters, took cognizance of no other injustice to the postmasters than that the adjusted salary of a postmaster might prove to be less than the average of the commis-

sions for the eight preceding quarterly returns of his office, which were used as a basis for determining or adjusting such salary. And the statute of 1883 is in terms enacted to direct the readjustment of such salaries as had not been theretofore readjusted under the provisions of the act of 1866. Here, then, is the specific wrong, if it may be so termed, which the statute was intended to correct, to wit: The neglect of the Postmaster-General to readjust the salaries of the postmasters pursuant to the statute of 1866. And there is no indication of any sort in this statute of the recognition by Congress of any other wrong or injustice to the postmasters nor of an intention to direct any other remedial action.

Finally, we have the distinct approval of Congress of the interpretation of the statute of 1883 placed upon the same by the Post-Office Department and here contended for by the Government, in the act of August 4, 1886 (24 Stat., c. 903, p. 307, sec. 8). This section, by which appropriation is made for the payment of readjusted salaries of postmasters, contains the following proviso:

> *Provided*, That the method of reviewing and readjusting the salaries of postmasters and late postmasters of the third, fourth, and fifth classes, under the classification of the act of July first, eighteen hundred and sixty-four, during the period between July first, eighteen hundred and sixty-four, and July first, eighteen hundred and seventy-four, which has been practiced in the Post-Office Department under and since the

act of March third, eighteen hundred and eighty-three, entitled "An act authorizing and directing the Postmaster-General to readjust the salaries of certain postmasters in accordance with the provision of section eight of the act of June twelfth, eighteen hundred and sixty-six," by which all such reviews and readjustments have been prospectively for the biennial periods provided for in the said act of July first, eighteen hundred and sixty-four, upon the basis of the quarterly returns of postmasters during the preceding biennial periods, respectively, whenever the salary actually paid was ten per centum less in amount than such salary should have been if adjusted correctly upon such returns by computing what the commissions upon the same would have been under the act of June twenty-second, eighteen hundred and fifty-four, and averaging the amount thereof annually, as directed by the act of July first, eighteen hundred and sixty-four, for fixing salaries, is approved and ratified as a correct administration of the aforesaid act of March third, eighteen hundred and eighty-three, and of all other acts applicable thereto; and that the several readjustments which have been made are ratified as a correct disposition of the several claims which have been considered and disposed of, and for which this appropriation is made; * * * and that in considering all claims not yet readjusted the same method shall be pursued which is hereby approved; and any and every different method of readjustment of salaries of such postmasters and

late postmasters during the period between July first, eighteen hundred and sixty-four, and July first, eighteen hundred and seventy-four, than is herein approved is hereby prohibited. * * *

AS TO RETROSPECTIVE READJUSTMENTS.

As for the stress which the counsel for claimant places upon the references made by this court to the retrospective effect of the statute of 1883, which have been quoted above, it seems inconceivable that any other meaning should be attached thereto than that plainly expressed, namely: That by the statute of 1883 authority was given to the Postmaster-General to make readjustments of the salaries of postmasters which should operate retrospectively. As has been already stated, this was an obvious comment and was made merely in passing, without reference to the determination of any question before the court. In neither case, indeed, was the question of the rule for adjustment prescribed by the statute of 1883 before the court in any form whatever. In the case of *McLean* v. *Vilas* (24 U. S., p. 87), in which this remark was first made, the only question was as to the duty of the Postmaster-General to readjust the salary of the claimant, and the case went off upon that point only.

In the *Verdier case* (164 U. S., p. 216), where this comment is again made, the salary of the claimant had been readjusted by the Postmaster-General pursuant to the statute of 1883, and beyond all question in the

manner complained of in this case, since it is a matter of public record that no other method has ever been adopted by the Post-Office Department. At any rate, no question regarding the mode of readjustment was raised in the case, the sole question having any reference to the readjustment being whether the claimant should be allowed interest upon the increased amount of his salary as readjusted.

It is incredible that this court should have rendered so important a decision as the establishment of a new rule for the readjustment of salaries of postmasters without having the question in any sense before the court, without any discussion of the question by counsel for either side, without any analysis of the question by the court, and within the limits of a brief paragraph.

Whilst this question has never before been squarely before this court, it was incidentally raised in the case of *McLean* v. *Vilas* (*supra*), and so far as any intimation at all was given therein it was in approbation of the rule of readjustment which has heretofore obtained in the Post-Office Department. On page 88 of the opinion in that case appears the following statement:

> Counsel for the defendant assert the proposition that, under the statutes on this subject, which will hereafter be referred to, there was no obligation resting upon the Postmaster-General to readjust the salaries of these officers oftener than once in two years; that such readjustment, when it took place, could only establish the amount of the salary for two years

> thereafter, and that no such readjustment could be made unless there were quarterly returns for two years preceding such readjustment on which it could be based.

The opinion goes on to review the various statutes relating to readjustments, including the statute of 1883, and then proceeds as follows:

> With the answer of the Postmaster-General are presented as exhibits two opinions of Attorney-General Brewster, given in response to requests of the Postmaster-General; also an opinion by the Assistant Attorney-General for the Post-Office Department, and the opinion of Postmaster-General Gresham in a letter to Hon. Frank Hatton, First Assistant Postmaster-General. All of these sustain the proposition already stated on behalf of the defendant.

SALARY OF CLAIMANT ALREADY CORRECTLY ADJUSTED.

Acting in accordance with the view of the statute taken by the Post-Office Department, as set forth above in *McLean* v. *Vilas*, and pursuant to the uniform custom of the Department in the readjustment of salaries of postmasters, the application of the claimant for readjustment of his salary was considered by the Postmaster-General and his salary readjusted as set forth on page 8 of the record. Upon this readjustment it was determined that the salary for the first term could not be readjusted for the reason that there was lacking a record of the eight quarterly returns immediately preceding the term; that for the second

and third terms there was due to the claimant upon such readjustment $186.90; that for the fourth term there was nothing due the claimant for the reason that the salary received by him was not ten per cent. less than it would have been upon the basis of commissions, under the act of 1854, upon the receipts of his office as shown by the eight quarterly returns immediately preceding such term.

It is respectfully insisted that this readjustment was made strictly in accordance with the terms and intent of the statute of 1883, under which this claim is brought, and that the claimant having been paid the amount thus allowed him upon such readjustment, his petition should have been dismissed by the Court of Claims.

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